

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,350

WILLIE S. D. CRAWFORD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CHARLES M. IRELAN,
United States Attorney.

WILLIAM S. MCKINLEY,
JOSEPH M. HOWARD,
WILLIAM J. PECK,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 20 1952

Joseph W. Stewart
CLERK

STATEMENT OF QUESTIONS PRESENTED

1. Whether statements of complaining witness made soon after she had been criminally assaulted, identifying the appellant as the individual who had committed the assault, were sufficiently contemporaneous with the assault to be allowable as spontaneous declarations.

2. Whether the trial court erred in admitting evidence of other acts of sexual intercourse between the appellant and the complaining witness prior to the specific act upon which the indictment was based.

3. Whether evidence of carnal knowledge was sufficient to withstand a motion for a judgment of acquittal, made at the close of the Government's case.

INDEX

Counterstatement of the Case	Page 1
Statutes and Rule Involved	8
Summary of Argument	9
Argument:	
I. Statements Made by Complaining Witness to Her Mother Soon After She Had Been Assaulted, Identifying Appel- lant As Assailant, Were Properly Admitted in Evidence As Spontaneous Declarations	10
II. In a Prosecution for a Sex Offense, Evidence of the Com- mission of Prior Like Acts Between the Accused and Complaining Witness Is Admissible as Showing a Dis- position to Commit the Act Charged	19
III. The Evidence was Sufficient to Warrant Submission of the Case to the Jury	21
A. Direct Evidence as to Assault and Identification of Accused Therewith	22
(1) Spontaneous declaration although contra- dicted, retains its probative value	23
(2) Substantive testimony of complaining witness was not effectively contra- dicted	25
(3) Conflict in substantive evidence, if such there was, was reconciled by showing of motive to corrupt testimony of com- plaining witness	27
B. Corroborative Facts and Circumstances Surround- ing the Parties at Time of Commission of Crime Clearly Point to Guilt of Accused	29
Conclusion	30

TABLE OF CASES

<i>Beausoliel v. United States</i> , 71 U.S. App. D.C. 111, 107 F.2d 292 (1939)	13, 14, 15, 16, 17, 24
<i>Borum v. United States</i> , 61 U.S. App. D.C. 4, 56 F.2d 300 (1932) ..	20
<i>Boyer v. United States</i> , 76 U.S. App. D.C. 397, 132 F.2d 12 (1942)	20
<i>Bracey v. United States</i> , 79 U.S. App. D.C. 23, 142 F.2d 85, <i>cert.</i> <i>denied</i> 322 U.S. 762, 64 Supp. Ct. 1274, 88 L.Ed. 1589 (1944)	20, 21, 28, 29
<i>Bridges v. Wixon</i> , 326 U.S. 135, 65 Sup. Ct. 1443, 89 L. Ed. 2103 (1945)	23
<i>Brown v. United States</i> , 80 U.S. App. D.C. 270, 152 F.2d 138 (1945)	13, 24
<i>Cohen v. United States</i> , 120 F.2d 139 (5th Cir. 1941)	21
<i>Curley v. United States</i> , 81 U.S. App. D.C. 389, 160 F.2d 229, <i>cert.</i> <i>denied</i> 331 U.S. 824, 67 Sup. Ct. 1316, 91 L.Ed. 1850 (1947)	22, 29

Cases—Continued

	Page
<i>Di Carlo v. United States</i> , 6 F.2d 364 (2d Cir. 1925), <i>cert. denied</i> 268 U.S. 706, 45 Sup. Ct. 640, 69 L. Ed. 1168	23
<i>Dowell, Inc. v. Jowers</i> , 166 F.2d 214 (5th Cir. 1948), <i>cert. denied</i> 334 U.S. 832, 68 Sup. Ct. 1346, 92 L.Ed. 1759	24
<i>Ellis v. United States</i> , 138 F.2d 612 (8th Cir. 1943)	21
<i>Ewing v. United States</i> , 77 U.S. App. D.C. 14, 135 F.2d 633, <i>cert. denied</i> 318 U.S. 776, 63 Sup. Ct. 829, 89 L.Ed. 1145 (1942)	25, 28, 29
<i>Glasser v. United States</i> , 315 U.S. 60, 62 Sup. Ct. 457, 86 L.Ed. 680 (1942)	29
<i>Grant v. United States</i> , 28 App. D.C. 169 (1906)	14
<i>Hobbs v. State</i> , 55 Tex. Cr. R. 299, 117 S.W. 811 (1909)	15
<i>Hodge v. United States</i> , 75 U.S. App. D.C. 332, 126 F.2d 849 (1942)	20
<i>Jack v. Mutual R.F. Life Ass'n</i> , 113 Fed. 49 (5th Cir. 1902)	14
<i>Keefe v. State</i> , 50 Ariz. 293, 72 Pac. 2d 425 (1937)	11, 13
<i>Kennedy v. Rochester City & Brighton R.R.</i> , 130 N.Y. 654, 29 N.E. 2d 832 (1946)	14
<i>Kidwell v. United States</i> , 38 App. D.C. 566 (1912)	19, 21
<i>Liberty Mutual Ins. Co. v. Thompson</i> , 171 F.2d 723 (5th Cir. 1949)	25
<i>Lyles v. United States</i> , 20 App. D.C. 557 (1902)	29
<i>Metropolitan R.R. v. Collins</i> , 1 App. D.C. 383 (1893)	14
<i>Montrose v. Nelson</i> , 175 F.2d 1021 (3d Cir. 1949)	25
<i>Shelton v. United States</i> , 83 U.S. App. D.C. 257, 169 F. 2d 665, <i>cert. denied</i> 335 U.S. 834, 69 Sup. Ct. 24, 93 L.Ed. 387 (1948)	25
<i>Smith v. So. Ill. & Mo. Bridge Co.</i> , 326 Mo. 109, 30 S.W. 2d 1007 (1930)	15
<i>Snowden v. United States</i> , 2 App. D.C. 89 (1893)	14, 15, 16, 24
<i>Solice v. State</i> , 21 Ariz. 592, 193 Pac. 19 (1920)	14
<i>Standard Accident Ins. Co. v. Heatfield</i> , 141 F.2d 648 (9th Cir. 1944)	14
<i>State v. Godwin</i> , 51 N.M. 65, 178 Pac. 2d 584	14
<i>State v. Stafford</i> , 237 Iowa 780, 23 N.W. 2d 832 (1946)	14
<i>United States v. Gallo</i> , 123 F.2d 229 (2d Cir. 1941)	25
<i>United States v. Krulewitch</i> , 145 F.2d 76 (2d Cir. 1944)	21
<i>United States v. Pape</i> , 144 F.2d 778 (2d Cir. 1944)	21
<i>Washington Railway & Electric Co. v. Wright</i> , 38 App. D.C. 268 (1912)	14
<i>Weaver v. United States</i> , 55 App. D.C. 26, 299 Fed. 893 (1924)	20

OTHER REFERENCES

McCormick, *The Turncoat Witness*:

<i>Previous Statements as Substantive Evidence</i> , 25 Texas L. Review 573 (1947)	24
---	----

Wigmore, *Evidence* (3d ed. 1940):

§ 1018	24
§ 1747	10, 17
§ 1749	14
§ 1750	14

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,350

WILLIE S. D. CRAWFORD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 10, 1951, a three-count indictment was filed against the appellant. The first count charged the appellant with carnally knowing and abusing a female child, Loretta Freeman, 8 years of age, in violation of D. C. Code (1940), § 22-2801; the second count charged the appellant with an assault with intent to carnally know and abuse said Loretta Freeman, in violation of D. C. Code (1940) § 22-501; the third count charged the appellant with having taken immoral, improper and indecent liberties with said Loretta Freeman with the intent of arousing, appealing to and gratifying his lust and passions and sexual desires, in violation of D. C. Code (1940) § 22-3501a (Supp. VII 1949). (J.A. 35.)

After a trial by jury consuming approximately two trial days (October 31 and November 5, 1951), appellant was

found guilty on Count One of the indictment and, on January 18, 1952, was sentenced to imprisonment for a period of from ten to thirty years. (J.A. 35.) At the close of the evidence offered by the Government on October 31, 1951, (the appellant neither testified nor offered any evidence in his behalf), a motion for judgment of acquittal was made by counsel for appellant and denied by the court (J.A. 17). On November 5, 1951, after the trial judge had concluded his questioning of various witnesses, appellant renewed his motion for judgment of acquittal, and the motion again was denied by the trial court. (J.A. 27). Appellant's motion for a new trial was denied by the trial court on January 18, 1952.

On the first day of the trial, and prior to the selection of the jury, (R. 6), the prosecuting attorney approached the bench and stated to the trial judge that he had information which indicated that a concerted effort had been made by one Mrs. Ida Dodwell, grandmother of the complaining witness, and girl friend of the appellant, to weaken the Government's case against the appellant by creating confusion and doubt in the mind of the complaining witness as to the identity of the individual who committed the criminal attack upon her. (J.A. 1). It was further noted by counsel for the Government that Mrs. Hattie Burgess, mother of the complaining witness and stepdaughter of the aforementioned Mrs. Dodwell, was of unstable character and under the domination of Mrs. Dodwell, and was, therefore, reluctant to pursue the case against the appellant. (J.A. 1). In view of the efforts of the complaining witness' immediate family to protect the appellant, it was the prosecuting attorney's opinion that certain testimony to be elicited from said complaining witness at the trial might prove to be inconsistent with statements made by her soon after the criminal attack had been committed upon her. (J.A. 1-2).

Mrs. Burgess (complaining witness' mother) was called as a witness for the prosecution and testified as follows: On August 18, 1951, she was living at 1531 Massachusetts Avenue, S. E., Washington, D. C. with her husband, the

complaining witness, an infant son, and her stepmother, Mrs. Dodwell. (R. 10, 11). Mrs. Burgess is gainfully employed, her working hours terminating at 11:00 p.m. each night. (J.A. 10). On the night of August 18, 1951, after having completed her work for the day, Mrs. Burgess attended a social function and did not return to her home until approximately 1:00 or 1:30 a.m. of the following morning. (J.A. 3, 21). Upon entering the house she observed the appellant, admittedly a constant visitor (J.A. 4, 5, 13, 16), and at least a partial resident therein (J.A. 13), asleep in a chair in the front room. (J.A. 5). She then proceeded upstairs to the sleeping quarters and, as was her usual custom, aroused the complaining witness and directed her to make use of the bathroom. (J.A. 4, 21). It was when the complaining witness arrived in the bathroom that her mother noted the presence of a fresh blood stain in the crotch of her (complaining witness') pajamas.¹ (J.A. 5). When asked by her mother to explain this circumstance, the complaining witness appeared upset, commenced to cry, and stated that there was nothing "wrong with her." (J.A. 21). Upon further questioning by Mrs. Burgess, however, which questioning consumed approximately two minutes (J.A. 22), she asserted that the appellant had ravished her and was the cause of the blood on her pajamas. (J.A. 22). In at least four other instances during the course of the trial Mrs. Burgess testified that the complaining witness stated on the night of the rape that she (the complaining witness) was absolutely sure that the appellant was the man who had attacked her. (J.A. 6, 7, 22). Mrs. Burgess further testified that the complaining witness unequivocally stated at the Grand Jury proceedings that the appellant had criminally attacked her on the night of August 18, 1951. (J.A. 6, 22).

After having concluded that the complaining witness had been attacked, Mrs. Burgess carried her to Gallinger Hospital in the District of Columbia for examination,

¹ The pajamas, Government Exhibit No. 1, were identified by Mrs. Burgess as those worn by the complaining witness on the night of August 18, 1951.

noting upon departure from the house, as she had noted upon her entrance, that the appellant was present therein. (J.A. 5). While the appellant appeared to be sleeping when Mrs. Burgess entered the house, he was seen conversing with Mrs. Dodwell as the complaining witness and Mrs. Burgess left the house. (J.A. 5).

On cross-examination, Mrs. Burgess testified that subsequent to the Grand Jury proceedings,² the complaining witness stated that she was no longer positive that the appellant was the individual who had attacked her. (J.A. 6, 7, 22). The complaining witness apparently was neither asked nor offered a clue as to whom, if not the appellant, had performed the illegal sex act upon her. Mrs. Burgess testified that the complaining witness explained her inability to identify her assaulter because the room was dark at the time the act occurred. (J.A. 7).

On redirect examination, Mrs. Burgess testified that after a discussion with her mother, Mrs. Dodwell, she determined to consult Attorney Miller, counsel for appellant, with respect to the instant case. (J.A. 8, 23). As an explanation for this action, Mrs. Burgess stated that she was nervous and distraught,³ that she did not, therefore, desire to be a participant in a court proceeding. (J.A. 8, 23.) It was her belief that by so obtaining the services of a private attorney the further prosecution of the case, at least insofar as she was concerned, could be prevented. (J.A. 8).

Mrs. Burgess testified that the appellant is a friend of the entire family, and more specifically, a particular friend of Mrs. Dodwell, her mother. (J.A. 4).

Dr. Jack Mangum was called as a witness for the prosecution and testified that he was on duty at Gallinger Hospital on the night of August 18, 1951, that he examined the female organs of the complaining witness and found a "red-

² It should be noted that the complaint against the appellant was filed on August 20, 1951, whereas the Grand Jury indictment against the appellant was not returned until September 5, 1951. (J.A. 35.)

³ Mrs. Burgess testified that she was formerly a patient in St. Elizabeth's Hospital. (J.A. 23).

dening of the external genitalia, of the mucous membranes, and also the skin." Dr. Mangum further testified as follows: "There was some light bleeding. The hymen . . . was intact except for a small tear on the posterior wall. My impression was that there were signs of recent trauma." (J.A. 9.)

The complaining witness, Loretta Freeman was called as a witness by the prosecution and testified as follows: On the night she was criminally attacked, August 18, 1951, she was sitting on a couch in the front room of her home before a television set. (J.A. 10). Her father was in the room initially but preceded her to bed, at which time she was alone in the room. (Her mother was at work, her grandmother at a party, and the appellant had not yet arrived (J.A. 10.)

While waiting to observe a particular television program, to commence at 11:00 P.M., the complaining witness fell asleep. (J.A. 10.) She "was awakened by a man, and he was on top of me. The television was off and *the light was on upstairs.*" (J.A. 10.) (Emphasis supplied) At the time of her awakening, the man was in the process of unbuttoning the pajama pants of the complaining witness. (J.A. 10). Her efforts to arise and thwart her attacker proved unavailing. (J.A. 10). After having accomplished the aforementioned preparatory act, the man in question completed an act of sexual intercourse upon the complaining witness, (J.A. 10-11), and, immediately thereafter, suggested that the act be repeated. The complaining witness replied in the negative, and the subject was not pursued. (J.A. 12) She testified that she did not recognize the voice of the man who spoke to her as being that of the appellant. (J.A. 14)

After completion of the above described act the complaining witness retired to her bed. (J.A. 12). As her mother had previously testified, the complaining witness stated that she was subsequently aroused from bed by her mother for the purpose of using the bathroom, that it was at this time that her mother observed blood on her pajamas, and that upon being asked to explain the presence of the blood she became upset and commenced to cry. (J.A.

12.) When asked by her mother as to whom had been "bothering" her, i.e., who had committed the criminal attack upon her, the complaining witness testified that she replied as follows: "I told her that Mr. Crawford was bothering me." (J.A. 13). The interrogation by the prosecuting attorney which followed is quoted from the Joint Appendix, p. 13:

Q. State whether or not your mother asked you at that time if you were sure, positive, it was Mr. Crawford.

A. Yes, she did.

Q. And what did you say to that?

A. I said, "Yes."

Subsequently, the following colloquies occurred between the trial judge and the complaining witness:

Q. How did you happen to tell your mother it was Mr. Crawford who did this [rape] to you?

A. I didn't have no one else to tell who did it. (J.A. 14).

* * * * *

Q. How did you happen to tell her about what happened? Did she ask you or did you volunteer to tell her?

A. She asked me.

Q. Did you want to tell her?

A. Yes.

Q. And that is when you told her, is that it?

A. Yes. (J.A. 20).

The complaining witness testified, without contradiction, that appellant's criminal attack of August 18, 1951, was merely the last of several similar attacks upon her, the first having occurred some months prior thereto. (J.A. 13, 20, 21). She further testified that the appellant and her father were the only men in the house on the night she was attacked, and that her father was not the assailant. (J.A. 12.)

The complaining witness testified that at approximately 4:30 a. m. on the morning after the night of the attack, August 19, 1951, she signed a statement before the investigating police officers in which she definitely stated that

the appellant was the person who had attacked her. (J.A. 16). She testified that she first expressed doubt as to the identity of assailant while being interviewed in the office of counsel for the appellant. (J.A. 11-12).

William A. Elliott, member of the Sex Squad, Metropolitan Police, was called as a witness for the prosecution and testified that at approximately 10:00 a.m. on the morning of August 20, 1951, the complaining witness stated, in the presence of the appellant, that the latter was the man who had attacked her on the night in question. The complaining witness positively identified the appellant on this occasion. The appellant, although admitting his presence in the home of the complaining witness on the night in question, denied having touched her. (J.A. 15.)

Mrs. Ida Dodwell (grandmother of the complaining witness and the mother of Mrs. Burgess) was called as the trial court's witness. She testified that she left the house at approximately 10:00 p.m. on the night of August 18, 1951, and did not return until after the attack upon the complaining witness had taken place. (J.A. 23). At the time of her departure only the complaining witness and her father were present in the house. (J.A. 23). Upon learning that the complaining witness had been criminally assaulted, and had identified the appellant as the perpetrator of the crime, Mrs. Dodwell questioned appellant with respect thereto. He denied that he had attacked the complaining witness. (J.A. 25.)

Mrs. Dodwell testified that she is a friend of the appellant, (J.A. 23), and that she and the appellant are joint operators of a farm in Maryland. (J.A. 26). While admitting that she knew, within a day or two after the instant crime had been committed, that Attorney Miller was serving as counsel for appellant, she denied having made any suggestion or influencing the decision of the complaining witness' mother to contact the office of counsel for the appellant.⁴ (J.A. 25, 26).

⁴ It should be noted that the testimony of Mrs. Dodwell in this respect (J.A. 25-26) is evasive and contradicts, for the most part, the testimony of Mrs. Burgess on the same subject. (J.A. 8.).

STATUTES AND RULE INVOLVED

D. C. Code (1940) § 22-2801:

Definition and penalty.—Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

D. C. Code (1940) § 22-501:

Assault with intent to kill, rob, rape, or poison.—Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

D. C. Code (1940) § 22-3501(a) (Supp. VII 1949):

Indecent acts—Children.—(a) Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than ten years.

Rule 29(a) Federal Rules of Criminal Procedure:

Motion for Judgment of Acquittal.—Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order

the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

SUMMARY OF ARGUMENT

1. Shortly after the complaining witness had been criminally assaulted, she asserted to her mother, Mrs. Burgess, that the appellant was her assailant. These assertions were properly admitted into evidence as spontaneous exclamations uttered substantially contemporaneous with the assault.

2. Over the objection of counsel for appellant the complaining witness was permitted to testify that she had been the subject of sexual attacks by the appellant on several occasions prior to the attack upon which the indictment was based. Such evidence was admissible to show a disposition on the part of the appellant to commit the act of which he was charged in the indictment.

3. At the close of the Government's case, the appellant moved for a judgment of acquittal, on the ground that the evidence adduced at the trial could not sustain a finding of guilt, such contention presumably being predicated on the failure of the complaining witness to affirmatively testify that the appellant was her assailant, and thus confirm her prior spontaneous exclamations. The motion was properly denied, despite the apparent exculpatory testimony of the complaining witness, for the following reasons:

(a) The spontaneous exclamations, linking the appellant with the offense charged in the indictment, did not lose the characteristic of substantive evidence even though the testimony of the complaining witness may have been in conflict therewith.

(b) The testimony of the complaining witness, when viewed in its entirety, proves to be in substantial accord with her prior declarations.

(c) Whatever conflict appeared in the evidence of the Government was effectively reconciled by the establishment of a clear-cut effort on the part of the complaining witness' immediate family to corrupt her testimony.

(d) The corroborative facts and circumstances surrounding the parties at the time the offense was committed pointed to the probable guilt of the appellant.

ARGUMENT

I

Statements Made by Complaining Witness to Her Mother Soon After She Had Been Assaulted, Identifying Appellant as Assailant, Were Properly Admitted in Evidence as Spontaneous Declarations

The complaining witness, on the night she was criminally assaulted, declared to her mother, Mrs. Burgess, that the appellant was her assailant. Mrs. Burgess was permitted to testify in the District Court, without objection of counsel, that the declarations were in fact made to her by the complaining witness. The appellant presently contends that the declarations in question were inadmissible as evidence, not being a part of the *res gestae*, but merely a narration of a past event. To support this contention the appellant asserts that the declarations were (1) made several hours after the attack had occurred and (2) only in response to interrogation by Mrs. Burgess.

With the appellant's contention that the incriminating declarations of the complaining witness did not constitute a part of the *res gestae*, we have no quarrel. Nor do we think that the declarations *were* admitted in evidence on the theory that they formed a part of the *res gestae*. It does not follow, however, conceding that the declarations did not constitute a part of the *res gestae*, that they were not admissible under another rule of evidence. We submit that the declarations were properly admitted in evidence as "spontaneous exclamations."⁵

⁵ A comprehensive discussion of the "spontaneous exclamation" doctrine is contained in Wigmore, Evidence (3d ed. 1940) § 1747, *et seq.*

While we have no desire to dwell on what may appear to be a sophistic argument with terminology, the distinction between the terms "*res gestae*" and "spontaneous exclamation" becomes important indeed to this case, for the reason that the question of admissibility of these two classes of utterances are based on entirely different principles. Should we concede, as we do not, that the declarations here under consideration were admitted in evidence as part of the *res gestae*, it might be necessary to further concede, as the appellant contends, that the trial court erred in so admitting the declarations. On the other hand, it seems abundantly clear that, under the principles applicable to "spontaneous exclamations," the declarations were properly admitted in evidence. The distinction between these two evidentiary doctrines, and the rules pertaining to each, has been admirably set forth in *Keefe v. State*, 50 Ariz. 293, 72 Pac. 2d 425 (1937), as follows:

. . . . There has been such a confusion of ideas and such indiscriminate use of the words "*res gestae*" that it is almost impossible, on reading the decisions involving this question, to discover the real extent of the exceptions and the principles involved therein. The phrase "*res gestae*" means literally "the thing done" and it is used in law as meaning the circumstances which are the automatic and undesigned incidents of the particular act in issue, and which are admissible in evidence when illustrative and explanatory of the act. The phrase is frequently applied to statements or explanations made in regard to an act in question by witnesses thereof. Such statements or explanations, however, are properly divided into two classes, and the admissibility of the respective classes is based upon entirely different principles of law and logic. They may be defined as "spontaneous exclamations" and "verbal acts." It is generally due to a confusion of these two classes of evidence and the principles governing their admissibility that the conflict between the many apparently irreconcilable decisions has arisen.

A spontaneous exclamation may be defined as a statement or exclamation made immediately after some exciting occasion by a participant or spectator and asserting the circumstances of that occasion as it is observed by him. The admissibility of such exclamation is

based on our experience that, under certain external circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him.

Verbal acts are utterances which *accompany* some act or conduct to which it is desired to give a legal effect. When such act has intrinsically no definite legal significance, or only an ambiguous one, its legal purport or tenor may be ascertained by considering the words accompanying it, and these utterances thus enter merely as a verbal part of the act. The use of utterances as verbal acts has four limitations: (a) The conduct to be characterized by these words must be material to the issue; (b) it must be equivocal in its nature; (c) the words must aid in giving legal significance to the conduct; and (d) the words must accompany the conduct.

It will be seen that these two classes of statements or exclamations are based on very different principles, and that the question of their admissibility must be determined by the principles applicable to the class within which they fall. Apparently many of the courts have confused these principles by attempting to apply to spontaneous exclamations the time limitations as related to the original act in question, which properly belongs only to verbal acts. *The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue, or whether that nervous excitement has died away so that the remark is elicited by the shock of some other act not at issue, which revives the memory of the act in question.* (Emphasis supplied)

Although the trial judge, in his instructions to the jury at the close of the evidence, appears to have described the complaining witness' declarations to her mother as being a part of the *res gestae*, an examination of the complete instruction in this respect discloses without question that said declarations were properly construed to be and admitted in evidence as spontaneous exclamations made by the complaining witness while under the domination of the mental shock which followed the criminal attack upon her. The pertinent portion of the instruction is quoted from the Joint Appendix, p. 31:

The law is very clear in cases of this character as to the admissibility of certain evidence, and it constitutes an exception to the hearsay rule, because the law does not admit hearsay evidence. . . . But in cases of this character there is an exception to the hearsay rule, and in this jurisdiction the law is that the prosecuting witnesses in cases of rape may testify as to whether or not they made complaint, when, and to whom, although the details of the disclosure are not admissible except on cross-examination or to conform her testimony, after it is impeached, or unless a part of the *res gestae*.

Now, *res gestae* merely means that statements under certain circumstances are admissible in evidence when made to another party if they are made within a short time after the commission of the crime and are spontaneous, free, and voluntary.

So it is conceivable that, where a case would be that the little girl spontaneously, freely, and voluntarily made the complaint and told what happened to her mother, and the mother testified at the trial . . . that comes in as independent evidence. It has been admitted in this case.

This Court, since 1893, has repeatedly and consistently held, for the reasons set forth in the *Keeffe* case, *supra*, that testimony of declarations, exclamations, or statements spontaneously made by a person while under the influence of excitement or shock caused by participation in an extraordinary event are "admitted in evidence as proof of the facts which they assert." *Brown v. United States*, 80 U.S. App. D.C. 270, 271, 152 F. 2d 138, 139 (1945); *Beauso-*

liel v. United States, 71 U.S. App. D.C. 111, 107 F. 2d 292 (1939); *Washington Railway and Electric Co. v. Wright*, 38 App. D.C. 268 (1912); *Grant v. United States*, 28 App. D. C. 169 (1906); *Metropolitan R.R. v. Collins*, 1 App. D.C. 383 (1893); *Snowden v. United States*, 2 App. D.C. 89 (1893).

It is clear that utilization of the doctrine of "spontaneous exclamations" does not require the declarant to be unavailable to testify. See, e.g. *Beausoliel v. United States*, *supra*, at 112, 107 F. 2d at 293; Wigmore, *Evidence* (3d ed. 1940) § 1749. Moreover, the declarations need not be precisely contemporaneous with the event they illustrate." *Beausoliel v. United States*, *supra*, at 114, 107 F. 2d at 295 (delay of a "few minutes"); *Snowden v. United States*, *supra*, at 94 (delay of approximately one hour). On the contrary, the guiding principle consistently followed by this Court has been stated as follows:

. . . [N]o inflexible rule as to the length of interval between the act charged against the accused and the declaration of the complaining party, can be laid down as established. In all such cases, the particular facts of each case must stand alone, and speak for themselves, as evidential means of proof of the crime charged."⁷

It is essential to note that greater latitude as to the time interval between act and utterance is permitted where, as in the instant case, "the victim is of such an [immature] age as to render it improbable that her utterance was deliberate and its effect premeditated, ..." *Beausoliel v. United States*, *supra*, at 114, 107 F. 2d at 295 (1939). The courts are particularly disposed to, and have, extended the

⁶ Wigmore, *Evidence* (3d ed. 1940) 1750; see *Standard Accident Ins. Co. v. Heatfield*, 141 F. 2d 648 (9th Cir. 1944) (1½ hours); *State v. Stafford*, 237 Ia. 780, 23 NW 2d 832 (1946) (14 hours); *State v. Godwin*, 51 N.M. 65, 178 Pac. 2d 584 (½ hour); and see *Kennedy v. Rochester City & Brighton R. R.*, 130 NY 654, 29 NE 141 (1891); *Jack v. Mutual R. F. Life Ass'n.*, 113 Fed. 49 (5th Cir. 1902); *Solice v. State*, 21 Ariz. 592, 193 Pac. 19 (1920).

⁷ *Snowden v. United States*, 2 App. D.C. 89, 94; (1893) quoted with approval in *Beausoliel v. United States*, 71 App. D.C. 111, 114, 107 F. 2d 292, 295 (1939).

time interval in cases of rape or abuse of female children. See *Snowden v. United States*, *supra*, at 94. Finally, and this is important, it has been held by this Court, and others,⁸ that a declaration which otherwise meets the criteria of the doctrine of spontaneous exclamations does not lose the characteristic of spontaneity, as required under the doctrine, merely because said declaration was made in response to inquiry or interrogation. *Beausoliel v. United States*, *supra*.

What, then, were the circumstances in the present case which permitted the trial judge, in the exercise of his sound discretion, see *Beausoliel v. United States*, *supra*, at 114, 107 F. 2d at 295, to admit in evidence the accusatory statements of the complaining witness?

(1) It is true that an interval of time elapsed between the criminal attack upon the complaining witness and her statement to her mother, identifying the appellant as the assailant. The appellant contends that the time interval consumed several hours. While the answer to this question was not precisely developed during the course of the trial, an examination of the available evidence conclusively demonstrates, viewing said evidence in a light most favorable to the appellant, that the time interval could not have been more than two and one-half hours' duration:

(a) Mrs. Burgess testified that she observed blood stains on the pajamas of the complaining witness between 1:00 a.m. and 1:30 a.m. of the morning following the brutal attack, (J.A. 3, 21), and that the declaration of the complaining witness was made almost immediately thereafter. (J.A. 22). Moreover, Mrs. Burgess testified that at the time in question (1:00 a.m.-1:30 a.m.) the blood stains were moist and fresh, (J.A. 6), an obvious indication that the assault had only recently taken place.

(b) Mrs. Dodwell, the grandmother, testified that she did not leave the house on the night of the attack until

⁸ *E. g. Smith v. Southern Ill. & Missouri Bridge Co.*, 326 Mo. 109, 30 SW 2d 1077 (1930); *Hobbs v. State*, 55 Tex. Cr. R. 299, 117 SW 811 (1909).

10:00 p.m. (J.A. 23). It is clear that the complaining witness had not been raped at that time.

(c) The complaining witness testified that she fell asleep while waiting for the commencement of an 11:00 p.m. television program. (J.A. 10). The rape which ensued had not been perpetrated at that time.

(d) Again, Mrs. Dodwell testified that the appellant stated to her, in denying that he had committed the assault on the complaining witness, that he had worked until 11:45 p.m. on the night in question. The appellant's time of arrival at the home of the complaining witness can, therefore, be fixed at approximately midnight.

An analysis of the above evidence permits the conclusion (1) that the rape did not occur earlier than 11:00 p.m. nor later than 1:00 a.m., and (2) that the declarations by the complaining witness which identified the appellant as her abductor were made not later than 1:30 a.m. Thus, there was no more than two and one-half hours intervening between the commission of the rape and the oral declaration thereof. When viewed in the light of the peculiar circumstances of the case, i.e. the nature of the act committed, the immediate unavailability of persons to whom a declaration could have been made, the close relationship of the appellant to the family of the complaining witness, the age of the complaining witness and her obviously distraught frame of mind at the time the declaration was made, the trial court could reasonably find, as it did, that the time which expired between act and declaration did not destroy the spontaneity of said declaration. See *Snowden v. United States*, *supra*, at 94; *Beausoliel v. United States*, *supra*, at 114, 107 F. 2d at 295.

(2) The evidence distinctly reveals that at the time the complaining witness declared the appellant to be her assailant she had by no means recovered from the mental shock which accompanied the gross attack upon her. Mrs. Burgess testified that the complaining witness, when asked to explain the presence of blood upon her pajamas, was visibly upset and commenced to weep. (J.A. 21). The

testimony of the complaining witness was to the same effect. (J.A. 12-13).

In *Beausoliel v. United States, supra*, statements made by the complaining witness, a child six years of age, to her mother, in which she described the details of an assault recently committed upon her by the defendant, were admitted in evidence through the testimony of the mother. This Court held, affirming the conviction below, that the "peculiar expression" on the face of the child shortly after the assault had occurred, was sufficient indication of a present nervous excitement to warrant the admission of statements relating to the assault as "spontaneous exclamations."

In this case we have far more tangible evidence of nervous stress on the part of the complaining witness than a peculiar facial expression. Here the child was weeping and unquestionably disturbed as the result of the recent violation of her person. Manifestly, the trial judge could reasonably find that the declarations of the complaining witness under these circumstances constituted a "spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock" which should be admitted in evidence.

(3) To sustain his contention that the incriminating declarations of the complaining witness should not have been treated as "spontaneous", the appellant places considerable reliance on the fact that such declarations were made in response to inquiry. As we have previously noted, this Court has ruled that merely because statements, otherwise spontaneous, "were made in response to inquiry is not decisive of the question of spontaneity." Rather, the question of spontaneity must necessarily be resolved in light of the "facts peculiar to each case, and be determined by the exercise of sound judicial discretion." *Beausoliel v. United States, supra*, at 114, 107 F. 2d at 295.

The two minute interrogation (J.A. 22) of the complain-

⁹ Wigmore, Evidence (3d ed. 1940) § 1747, quoted with approval in *Beausoliel v. United States*, 71 App. D.C. 111, 113, 107 F. 2d 292, 294 (1939).

ing witness by her mother was most perfunctory in nature and could in no way have destroyed that which was uppermost in the child's mind, *i.e.*, that she had only recently been subjected to a violent sexual attack by the appellant. The following excerpts which are quoted from the record amply sustain the above conclusion:

Colloquy between Prosecuting Attorney and Complaining Witness.

Q. (The question of the prosecutor is omitted as the answer below is not responsive thereto)

A. . . . So I went in the bathroom, and when I came back my mother told me to come back and let her see my pajamas.

And I started crying and I told her that there was nothing wrong with them.

And my father was asleep in the bed, and he told me to go on back and let her see them, (J.A. 12)

So I went back in there, and she asked me who had been bothering me. She asked me did I fall down or had any boys been bothering me.

I told her "No."

And she asked me who had.

So I started crying, and I told her that Mr. Crawford was bothering me. (J.A. 13).

Colloquy Between Trial Judge and Mother of Complaining Witness.

Q. Did she tell you what happened to her?

A. Yes; she said Mr. Crawford did that to her, made the blood on her.

Q. Did she volunteer that statement?

A. After I kept questioning her.

Q. And how long did you question her?

A. Oh, about two minutes.

Q. You mean, by questioning her, asking her how it happened?

A. Yes. (J.A. 22).

We submit that the following conclusions may be reasonably drawn from the above testimony:

(1) The declarations of the complaining witness, although made in response to inquiry, were freely and voluntarily given;

(2) There is no indication that the declarations were made with calculation, or upon reflection, or as the result of self-interest;

(3) The casual and disinterested attitude of the mother during the interrogation (J.A. 12, 19, 20, 21) negatives the idea that the answers of the complaining witness were extorted from her.

(4) The inquiry was of the most elementary and short-lived nature, amounting to little more than "who has been bothering you?"; the response of the complaining witness was immediate and direct. These factors again remove the possibility of calculation or reflection.

To summarize, it is the position of the Government that the declarations of the complaining witness, when viewed in the light of the circumstances under which they were made, meet the rules and tests of the doctrine of "spontaneous exclamations" as have been heretofore enunciated by this Court. Such declarations were, therefore, properly admitted in evidence by the District Court.

II

In a Prosecution for a Sex Offense, Evidence of the Commission of Prior Like Acts Between the Accused and Complaining Witness Is Admissible as Showing a Disposition to Commit the Act Charged

At the trial in the court below, the complaining witness was permitted to testify on direct examination, over the objection of defense counsel, that appellant had sexually attacked her on several occasions previous to the act charged in the indictment. (J.A. 20-21). The appellant contends that such evidence was inadmissible in view of (1) the failure of the complaining witness at the trial to identify the appellant as her assailant, and (2) the failure of the Government to establish specific proof of the act charged,¹⁰ as required by *Kidwell v. United States*, 38 App. D. C. 566 (1912).

¹⁰ Point 2 of the appellant's argument above is directed solely to the proposition that the evidence was insufficient to warrant submission of the case to the jury. This question is treated separately in Part III of the Government's argument, *infra*.

While it is no doubt true that, as a general principle of law, evidence of crimes wholly independent of the one for which the defendant is on trial is inadmissible, *Boyer v. United States*, 76 U. S. App. D. C. 397, 132 F. 2d 12 (1942); see *Borum v. United States*, 61 App. D. C. 4, 6, 56 F. 2d 300, 302 (1932), the law is well settled in this jurisdiction that in prosecutions for sexual offenses, the complaining witness is permitted to testify as to the commission of prior like acts between the parties. *Bracey v. United States*, 79 U. S. App. D. C. 23, 142 F. 2d 85, cert. denied 322 U. S. 762, 64 Sup. Ct. 1274, 88 L. Ed. 1589 (1944); *Hodge v. United States*, 75 U. S. App. D. C. 322, 126 F. 2d 849 (1942); *Weaver v. United States*, 55 App. D. C. 26, 299 Fed. 893 (1924). The rationale of this exception to the general rule has been appropriately stated in the *Bracey* case, *supra*, as follows:¹¹

The theory of this exception is that as the mental disposition of the accused, at the time of the act charged, is relevant, evidence that at some prior time he was similarly disposed is also relevant. Evidence of prior acts between the same parties is admissible, therefore, as showing a disposition to commit the act charged; the probabilities being that the emotional predisposition or passion will continue.

The fact that the testimony of the Government's principal witness may have proved to be partially inconsistent with her previous spontaneous exclamations¹² would not, for that reason, render inoperative the above stated rule. While it does not appear that the courts have heretofore specifically considered the question in the context in which it appears in this case, it is significant to note that in cases where the prosecuting witness has become recalcitrant on direct examination, or is not called upon to testify because of her affinity to the defendant, evidence of prior offenses similar to that charged in the indictment has not been thereby excluded.

¹¹ *Bracey v. United States*, 79 U.S. App. D.C. 23, 26, 142 F. 2d 85, 88 (1944).

¹² It will be shown in Sec. III of the Government's argument that the testimony of the complaining witness at the trial was only superficially inconsistent with her prior extrajudicial statements.

See *Ellis v. United States*, 138 F. 2d 612, 614 (8th Cir. 1943) (rev'd on other grounds); *United States v. Pape*, 144 F. 2d 778, 782 (2d Cir. 1944) *cert. denied* 323 U.S. 752, 65 Sup. Ct. 86, 89 L. Ed. 602; *Cohen v. United States*, 120 F. 2d 139, 140 (5th Cir. 1941).

In the *Kidwell* case, *supra*, this Court was reviewing, as it is here, a conviction for carnal knowledge, in which the Government was permitted to introduce evidence of prior sex offenses on the part of the appellant. The conviction was reversed, this Court ruling, *inter alia*, that the lower court erred in admitting evidence of prior offenses, not because the prosecutrix had failed to testify as to the commission of the specific act charged in the indictment, although it was noted that she had not, but for the reason that the Government had failed to submit specific proof of the act charged. The Government was there relying *solely* upon the testimony of the prosecutrix to sustain the conviction. There being no substantial evidence, as a matter of law, that the accused had committed the crime of which he was charged, it logically followed that other acts of intercourse were inadmissible. In short, the Government had failed to supply the peg upon which to hang the prior offenses.

Whether prior offenses are admissible, then, hinges upon the sufficiency of the Government's evidence as a whole to sustain the charge contained in the indictment. As we shall demonstrate, *infra*, this burden was overwhelmingly sustained. It follows, therefore, that the evidence of prior sex offenses on the part of the appellant was properly admitted as tending logically to prove the appellant guilty of the crime of which he was charged. *Bracey v. United States*, *supra*.

III

The Evidence Was Sufficient to Warrant Submission of the Case to the Jury

Appellant's argument that the evidence in this case was insufficient to sustain a conviction for carnal knowledge (App. Brief, 5) is directed primarily to the fact that the complaining witness testified at the trial that she could not

say that the appellant was the man who had criminally assaulted her as charged in the indictment. In addition, the appellant asserts that the remainder of the Government's evidence does not overcome the adverse testimony of the complaining witness. (App. Brief, 5)

The requirements as to quantity and character of proof were exhaustively explored in *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied* 331 U.S. 824, 67 Sup. Ct. 1316, 91 L. Ed. 1850 (1947). The conclusion of this Court was stated as follows at 392, 160 F. 2d at 232:

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

The Government submits that the evidence at the trial was not merely consistent with guilt, but it foreclosed the hypothesis of innocence.

A. Direct Evidence as to Assault and Identification of Accused Therewith

That the complaining witness had been carnally assaulted at the approximate date charged in the indictment was established by uncontroverted medical testimony as to the physical condition of the complaining witness (J.A. 9), and the presence of bloodstains, fresh and moist, in the crotch of the latter's pajamas. (J.A. 4, 5, 6).

The identification of the appellant with the criminal assault rests chiefly on the testimony of the complaining witness, her mother, and the police officer, William Elliott. The evidence clearly discloses that the complaining witness,

on four separate occasions, positively identified the appellant as her assailant:

(1) Shortly after the assault had occurred, the complaining witness declared to her mother that the appellant had attacked her. Both mother and child testified to this fact. (J.A. 6, 7, 11, 13, 22.)

(2) The complaining witness testified that at approximately 4:30 a.m. following the assault she stated to police officers, and confirmed her statement in writing, that the appellant had assaulted her. (J.A. 16)

(3) Police Officer Elliott testified that the complaining witness appeared at police headquarters on the morning of August 20, 1951, and, in the presence of the appellant, unequivocally identified him as the man who had criminally assaulted her on the night of August 18, 1951 (J.A. 15, 16.)

(4) The complaining witness testified before the Grand Jury proceedings that the appellant had committed the criminal assault upon her. (J.A. 6, 7, 22).

Of what evidentiary value are the above declarations in view of the apparently contradictory statements made by the complaining witness at the trial?

1. *Spontaneous Declaration. Although Contradicted, Retains Its Probative Value*

The federal courts have held, with virtual uniformity, that a prior contradictory statement is admissible for the purpose of impeaching the credibility of the witness, but may not be treated as having any substantive or independent testimonial value ¹³ *Bridges v. Wixon*, 326 U.S. 135, 151-153; 65 Sup. Ct. 1443, 1451-1452, 89 L. Ed. 2103, 2113-2115 (1945); *Dowell, Inc. v. Jowers*, 166 F. 2d 214 (5th Cir.

¹³ But see *Di Carlo v. United States*, 6 F. 2d 364 (2d Cir. 1925), cert. denied 268 U.S. 706, 45 Sup. Ct. 640, 69 L. Ed. 1168 (1925) wherein Judge Learned Hand stated at p. 368: " * * * [I]f necessary to bring out the truth, it is extremely proper to inquire of such a [recalcitrant] witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and hearing, even if it be in respect of contradictive answers he may have made at other times. * * *

"The possibility that the jury may accept as the truth the

1948), *cert. denied* 334 U.S. 832, 68 Sup. Ct. 1346, 92 L. Ed. 1759.

If the above rule of evidence is to be applicable in all circumstances, and assuming for the moment that an actual self-contradiction exists, the extra-judicial declarations of the complaining witness were admissible in evidence merely for the purpose of impeaching her credibility. The precise question before this Court, however, *i.e.*, the evidentiary status of a *spontaneous exclamation* subsequently contradicted on the witness stand, has, insofar as we have been able to determine, never been judicially considered. It is the Government's firm position that the declarations made by the complaining witness at the approximate time of the assault, identifying the appellant as her assailant, retain their strong probative value, despite the subsequent contradiction thereof, if such there was, and were properly admitted as independent testimonial evidence for the purpose of proving the truth of the facts which they asserted. To hold otherwise is to repudiate the underlying principle of spontaneous exclamations, *viz.*, the testimony of exclamations and statements made under the uncontrolled domination of the senses are taken as particularly trustworthy, and are, therefore, admitted in evidence as *substantive proof of the facts which they assert*. *Beausoliel v. United States, supra*; *Snowden v. United States, supra*; *Brown v. United States, supra* (rev'd on other grounds). To state the proposition in another way, spontaneous exclamations, because of the circumstances under which they are uttered, are accorded at least the same evidentiary weight, despite their extra-judicial characteristic, as testimonial evidence. This being so,

earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. *If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mystical necessity that the case must be decided only in accordance with the truth of the words uttered under oath in court.*" (Emphasis supplied.) Wigmore, *Evidence* (3d Ed. 1940) § 1018; McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Texas L. Review 573 (1947).

it would seem to logically follow that such utterances are not to be treated, when contradicted by testimonial evidence, in the same manner as the ordinary extra-judicial statement under the same circumstances, *i.e.*, for purposes of credibility only. Rather, the rule of evidence applicable to testimony adduced at the trial which is thereafter contradicted by other testimony should be employed. Specifically, the spontaneous exclamation and the testimonial contradiction thereof should be submitted to the jury, not for purposes of testing credibility, but to permit the latter body to weigh the conflicting evidence and arrive at a conclusion as to which story is worthy of belief. See *Shelton v. United States*, 83 U.S. App. D.C. 257, 259, 169 F. 2d 665, 667, *cert. denied* 335 U.S. 834, 69 Sup. Ct. 24, 93 L. Ed. 387 (1948); *Montrose v. Nelson*, 175 F. 2d 1021, 1022 (3d Cir. 1949); *Liberty Mutual Ins. Co. v. Thompson*, 171 F. 2d 723, 726 (5th Cir. 1949); *United States v. Gallo*, 123 F. 2d 229, 230 (2d Cir. 1941). In order to maintain a pattern of consistency, it would also seem to follow that the statements made by the complaining witness to the police officers and before the Grand Jury, in which she confirmed the facts contained in her spontaneous exclamations, should retain their position as corroborative evidence,¹⁴ resting as they do on substantive evidence.

2. *Substantive Testimony of Complaining Witness Was Not Effectively Contradicted*

While it has been assumed to this point, *arguendo*, that the testimony of the complaining witness at the trial was wholly inconsistent with her prior spontaneous exclamations, an analytical examination of her entire testimony discloses a singularly contrary picture. Indeed, except for her refusal to specifically designate the appellant as her assailant the testimony of the complaining witness points the finger of guilt squarely and inescapably upon the appellant.

¹⁴ See *Ewing v. United States*, 77 U.S. App. D.C. 14, 17, 135 F. 2d 633, 636 *cert. denied* 318 U.S. 776, 63 Sup. Ct. 829, 87 L. Ed. 1145 (1942).

(1) Mrs. Burgess testified that the complaining witness attributed her apparent inability to identify her assailant to the fact that at the time the attack occurred the room was dark. (J.A. 6, 7, 22). The explanation was effectively repudiated by the complaining witness, however, who testified that at the crucial moment a light was in fact burning in the upstairs hallway. (R. 44). Moreover, although offered the opportunity, (J.A. 11) she declined to assign the darkness of the room as the factor which precluded recognition of the assailant.

(2) In response to questioning by the trial judge, the complaining witness testified that, although she was unable to identify her assailant, there were only two men in the house on the night of the assault, her father and the appellant. She peremptorily denied any participation in the crime on the part of her father. (J.A. 12.) The unavoidable conclusion that must be drawn from this testimony is that the appellant was in fact the assailant. If doubt remained as to the appellant's culpability, however, it was effectively resolved by the following interrogation:

Q. How did you happen to tell your mother it was Mr. Crawford who did this to you?

A. I didn't have no one else to tell who did it. (J.A. 14).

Thus, the complaining witness, despite her previous assertions to the contrary, and perhaps unwittingly, seemed forced to conclude that the appellant was her assailant.

(3) The testimony of the complaining witness with respect to the nonchalant attitude of the assailant after the act of copulation had been completed **dissipates all suspicion** or speculation as to the possibility that a stranger had surreptitiously invaded the privacy of her home to commit the criminal assault. The temerity of the assailant in suggesting that the act be repeated, his apparent complete unconcern as to the likelihood of detection, the fact that he made no effort to leave the house after relieving his lustful passions, (J.A. 12), these were not the acts of an interloper, unaccustomed to his surroundings. On the contrary, the assailant was obviously on familiar ground,

aware of the movements of the people who occupied the house, and confident of his position in spite of crime he had just committed. The evidence fails to disclose the presence in the house of any man other than the appellant who could maintain this serene composure. The above noted circumstances leave little room for interpolation.

It is submitted that careful examination of the testimony of the complaining witness demonstrably repudiates her exculpatory testimony with respect to the appellant and directly confirms her prior spontaneous exclamations.

3. Conflict in Substantive Evidence, If Such There Was, Was Reconciled by Showing of Motive to Corrupt Testimony of Complaining Witness.

Moreover, while the evidence discloses absolutely no motive on the part of the complaining witness to falsely accuse the appellant initially as her assailant, the record is replete with evidence which explains her equivocal testimony on the witness stand:

(1) The appellant was admittedly the paramour and business associate of the complaining witness' grandmother (J.A. 4, 13, 26.) The grandmother, who appears to dominate the family of the complaining witness, (J.A. 8, 25), had an obviously compelling motive to protect the appellant, and was in a position to transfer such motive to the complaining witness, an immature and malleable individual.

(2) The mother of the complaining witness displayed an utter lack of even a rudimentary sense of responsibility for the complaining witness, and freely admitted to her unstable character. (J.A. 23). When apprised of her daughter's bloodstained condition on the night of the assault, she demonstrated an amazing indifference to the situation, and only through the insistence of her husband was she prevailed upon to make more than a cursory examination of the child (J.A. 19). Furthermore, she testified with utmost candor that she had no interest in pursuing the case against the appellant (J.A. 7, 23), that

she desired to terminate it without prosecution (J.A. 7). Indeed, so vigorous were her feelings in this connection that she employed legal counsel to advise her with respect thereto. (J.A. 8, 23).

(3) Perhaps the strangest, and at the same time the most revealing, circumstance in the case to explain the exculpatory testimony of the complaining witness was the fact that the mother, feeling the need of legal advice, peculiarly chose as her attorney, trial counsel for the appellant. (J.A. 6). Significantly enough, the choice of counsel was determined after consultation with the complaining witness' grandmother. (J.A. 25), whose emotional and economic interests were obviously in jeopardy. While we impute no corrupt motive to counsel for appellant, it is highly important to note that the complaining witness consistently and unequivocally maintained that the appellant was her assailant for a period of 18 days, during which time she was interrogated by her mother, by police officers on two occasions, and before the Grand Jury. The first occasion on which she expressed doubt as to the identity of her ravisher appears to be following the Grand Jury proceedings. (J.A. 22), and after consultation with counsel for the appellant.¹⁵ (J.A. 6, 7, 12, 22).

These, then, are the facts and circumstances which explain the contradictory testimony of the complaining witness. Faced with united opposition, a child of 8 years could scarcely have conducted herself otherwise. The courts, recognizing full well the improbatory pressures with which witnesses are frequently confronted, universally admit in evidence, as did the trial judge in this case, facts and circumstances tending to show interest, bias or motive on the part of a particular witness. *Bracey v. United States*, *supra*; *Ewing v. United States*, 77 U.S. App. D.C. 14, 135

¹⁵ While the testimony overwhelmingly sustains the conclusion that the complaining witness and her mother consulted counsel for appellant following the Grand Jury proceedings, in justice to said counsel, it should be noted that on one occasion during the trial the complaining witness testified that she thought she went to Mr. Miller's office prior to the Grand Jury proceedings (J.A. 17).

F. 2d 633, *cert. denied* 318 U.S. 776, 63 Sup. Ct. 829, 87 L. Ed. 1145 (1942).

B. Corroborative Facts and Circumstances Surrounding the Parties at Time of Commission of Crime Clearly Point to Guilt of Accused

In addition to the introduction of the previously considered evidence linking the appellant to the crime charged in the indictment, the jury was provided with a substantial quantum of corroborative evidence pointing to the probable guilt of the appellant.

The evidence established that a complaint was made to police officials within three or four hours after the commission of the crime. See *Ewing v. United States*, *supra*, at 17, 135 F. 2d 633, 636. Reasonably diligent efforts to secure the arrest of the accused were made. See *Lyles v. United States*, 20 App. D.C. 557, 563 (1902). The medical evidence established that the hymen of the complaining witness had been ruptured or penetrated. See *Ewing v. United States*, *supra*. It is undisputed that the appellant was in the house of the complaining witness on the night, and at the approximate time, of the assault. See *Ewing v. United States*, *supra*. The condition of the complaining witness at the time she informed her mother of the attack was unusually nervous and distraught. See *Ewing v. United States*, *supra*. Finally, there was uncontroverted testimony that the appellant had committed sex offenses upon the person of the complaining witness on several prior occasions. See *Bracey v. United States*, *supra*.

It is submitted that the evidence presented at the trial and the facts and inferences reasonably to be drawn therefrom point convincingly to the guilt of the appellant. Suffice it to say that there was certainly present that "substantial evidence" which is the maximum necessary to sustain a conviction on appeal. *Glasser v. United States*, 315 U.S. 60, 62 Sup. Ct. 457, 86 L.Ed. 680 (1942); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied* 331 U.S. 824, 67 Sup. Ct. 1316, 91 L.Ed. 1850 (1947).

CONCLUSION

The declarations made by the complaining witness soon after she had been criminally assaulted were properly admitted in evidence as spontaneous exclamations. Likewise, the admission of prior sex offenses on the part of the appellant to the person of the complaining witness was entirely proper in accordance with the established rule of evidence. The Government successfully explained the reasons for the conflicting statements of the complaining witness, if conflict there was, relative to the identity of the appellant, by establishing a deep-seated motive of interested parties to protect the appellant at the expense of the complaining witness. The Government sufficiently made out the elements of the offense charged in the indictment to warrant submission of the case to the jury. It is respectfully submitted that the judgment of the District Court be affirmed.

CHARLES M. IRELAN,
United States Attorney.

WILLIAM S. MCKINLEY,

JOSEPH M. HOWARD,

WILLIAM J. PECK,

Assistant United States Attorneys.

